

2001

## State of Utah v. Roll Kent Bickley : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH :

Plaintiff/Appellee :

v. :

ROLLO KENT BICKLEY :

Case No. 20010416-CA

Defendant/Appellant :

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**APPELLANT'S REPLY BRIEF**

Appeal from a judgment of conviction for criminal nonsupport, a class A misdemeanor, in violation of Utah Code Annotated section 76-7-201 (1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Pat B. Brian, presiding.

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**INTRODUCTION**

As the State concedes in its brief, this appeal principally addresses whether Mr. Bickely agreed to pay restitution for all monies owed or whether he only agreed to pay for the period specified in the Criminal Information. State's Brief at 9. The State fails to recognize that in accepting guilty pleas, trial judges only have authority to impose restitution for uncharged offenses if they have affirmatively established that criminal defendants have admitted to other crimes or have agreed to pay restitution for uncharged offenses. The State does not contest that the trial judge failed to do so here. Even ignoring the trial judge's duties, the record demonstrates that Mr. Bickley only agreed to pay restitution for the period specified in the Information. Thus, the trial judge could only order restitution for the specific crime to which Mr. Bickley pleaded guilty. Because of the trial court's omissions and given the State's duty to know the law it is enforcing, this Court must remand this matter for a new restitution hearing.

**I. THE TRIAL COURT ONLY HAD AUTHORITY TO IMPOSE RESTITUTION FOR THE PERIOD SPECIFIED IN THE CRIMINAL INFORMATION**

In its brief, the State does not dispute that trial court failed to fulfill its duty to "firmly establish[]" the amount Mr. Bickley agreed to pay in restitution. State v. Mast, 2001 UT App 402, ¶18, 40 P.3d 1143 (quoting State v. Watson, 1999 UT App 273, ¶5, 987 P.2d 1289). In fact, when Judge Stirba accepted Mr. Bickley's guilty plea, she never inquired about the meaning of the term in the plea agreement, "total victim restitution." R. 347; 515: 11-12. She appeared to assume the parties understood the terms of the agreement. Further, rather than carrying out his duty to firmly establish the restitution agreement, Judge Brian erroneously deferred to civil collection law and reasoned that it allowed him to impose restitution for all child support arrears. R. 413. Thus, neither judge ever attempted to ascertain the parameters of the restitution agreement in direct violation of Mast and Watson. Contrary to the State's claim that Judge Stirba adequately canvassed Mr. Bickley, this duty to establish a restitution agreement supplements the requirements under Rule of Criminal Procedure 11. State's Brief at 12.

The State argues, at length, that viewing together the guilty plea affidavit, trial counsel's statements, and the parties' pleadings reveals that Mr. Bickely agreed to pay "complete restitution" as defined under Utah Code Annotated section 76-3-201(4)(c)(i) (1999). State's Brief at 9-17. To reach this conclusion, the State resorts to inferring Mr. Bickley's and the prosecutor's "state of mind" below. Mast, 2001 UT App 402, ¶13, 40

P.3d 1143 (quoting Watson, 1999 UT App 273, ¶5, 987 P.2d 1289). This Court has ruled that "making inferences" does not satisfy the firm establishment requirement when determining whether a defendant has agreed to pay restitution for uncharged conduct, such as here. Watson, 1999 UT App 273, ¶5, 987 P.2d 1289.

To avoid the trial court's obvious failings, the State argues that the record taken as a whole indicates that Mr. Bickley agreed to pay all arrears. State's Brief at 10, 14-17. This argument overlooks the trial court's affirmative duty to firmly establish the restitution agreement on the record. Moreover, even if the State's proposed totality-of-the-circumstances approach could substitute for the trial court's duty to inquire, the record demonstrates that Mr. Bickley only agreed to pay restitution for the time period specified in the Information.

Even before pleading guilty, Mr. Bickley filed a pretrial motion to limit the amount of restitution that he owed to the dates specified in the Information. R. 151-60. He further hoped to reduce the amount of court-ordered restitution because his health problems prevented him from working. R. 39, 402. Thus, from the outset of this case, Mr. Bickley sought to limit his potential monetary liability for the charged crime.

In the plea affidavit itself, Mr. Bickley only admitted that he failed to pay child support "[d]uring the period between February 1, 1997 and January 10[, ] 2000." R. 345. He then agreed that "total restitution be entered in the amount of my obligation for child support arrears that I owe for my children, with the understanding that the amount of



court[-]ordered restitution and monthly [payments] remain to be determined by the court." R. 347. The agreement contains no indication, however, that Mr. Bickley agreed to pay for arrears outside the dates specified in the plea agreement.

The plea hearing transcript and Mr. Bickely's presentence motion to determine the restitution award prove that Mr. Bickley only agreed to pay restitution for the period charged in the Information. In accepting Mr. Bickley's guilty plea, Judge Stirba on three separate occasions, specifically defined Mr. Bickley's offense as failing to pay child support between "the first day of February 1997 and the 10<sup>th</sup> day of January 2000." R. 515: 3, 9, 13. She also instructed him that restitution would be a "sure thing" on the amount he "did not pay before." R. 515: 11-12. Judge Stirba did not clarify that amount.

Following Judge Stirba's acceptance of the guilty plea, trial counsel offered to file a memorandum to guide Judge Stirba in determining the "court-ordered" restitution. R. 515: 18. Counsel stated that she thought that the prosecutor would agreed with her on the "complete restitution" amount. R. 515: 18. As for court-ordered restitution, trial counsel indicated that she would be requesting the court to impose an award less than the complete amount of restitution owed, apparently based on Mr. Bickley's defense that he lacked the ability to pay child support because his hypothyroidism prevented from maintaining steady employment. R. 39; 402; 515: 18-19.

As trial counsel's subsequent memorandum demonstrates, trial counsel defined "complete restitution" as limited to the period specified in the Information. R. 359-60.

Trial counsel began her argument with the presumption that restitution was limited by that period and calculated that amount to be \$11,413.42. R. 360-62. Consistent with her representations at the plea hearing, trial counsel argued that given Mr. Bickely's poor health, poor earning potential, and lack of resources, the trial court should reduce the court-ordered amount to avoid setting up Mr. Bickely for failure. R. 362-65.

As this background illustrates, the State mischaracterizes the record when it argues that trial counsel admitted that Mr. Bickley agreed to pay for all arrears. State's Brief at 14-17. When trial counsel referred to "complete restitution," she plainly meant the total amount that Mr. Bickley failed to pay during the period specified in the Information and to which he admitted that he failed to pay. R. 470: 3-4; 515; 18-19. At no time did trial counsel or Mr. Bickely ever agree to pay more than \$11,413.42. In fact, the record reveals that Mr. Bickley hoped that by pleading guilty he would be liable for less than that amount given his health problems.

Thus, even excusing the trial court's failure to firmly establish the restitution agreement, the record supports that Mr. Bickley only agreed to pay restitution for the crime of which he pleaded guilty. To rule otherwise, in the absence of a firm determination, would implicate the fundamental, constitutional rights discussed in the opening brief. Appellant's Brief at 19-23. Because Mr. Bickley did not agree to pay restitution for uncharged crimes, Judge Brian erred in ordering him to pay restitution for arrears dating back to 1982.

## **II. UTAH LAW REQUIRES A REMAND TO DETERMINE THE AMOUNT OF RESTITUTION OWED**

As this Court has done in similar cases, the trial court's failure to firmly establish the restitution agreement requires this Court to remand this matter for a new restitution hearing. Contrary to the State's claims, the case law does not support rescinding the plea agreement. State's Brief at 18-20. Rather, even the cases the State cites in its brief support a remand for a new hearing.

This Court has repeatedly ruled that when the trial court has not firmly established that a defendant has admitted to uncharged crimes or agreed to pay restitution for unconvicted conduct, the trial court may only impose restitution for the convicted offense. State v. Martinez, 2002 UT App 207 (memorandum decision); Mast, 2001 UT App 402, ¶19, 40 P.3d 1143; Watson, 1999 UT App 273, ¶6, 987 P.2d 1289. This case is identical to those prior rulings. The cases the State cites are inapplicable to this appeal because unlike this appeal, in each of those cases the defendants sought to withdraw their guilty pleas. State v. Pharris, 798 P.2d 772, 778 (Utah Ct. App. 1990) (defendant not informed of several fundamental rights before pleading guilty); State v. Smith, 777 P.2d 464, 466 (Utah 1989) (trial judge failed to inform defendant that prison term was mandatory); State v. West, 765 P.2d 891, 896 (Utah Ct. App. 1988) (prosecution and defense both misunderstood offense to be one degree higher than actual crime). Where, as here, the defendant seeks to correct an erroneous restitution award, this Court has simply remanded

for a restitution hearing. Martinez, 2002 UT App 207; Mast, 2001 UT App 402, ¶19, 40 P.3d 1143; Watson, 1999 UT App 273, ¶6, 987 P.2d 1289.

To rescind a plea agreement against a defendant's wishes, the State must establish grounds for rescission as a matter of law. State v. Patience, 944 P.2d 381, 384 (Utah Ct. App. 1997). Principles of contract law generally apply in making this determination. Id. at 386. But, because "the underlying contract right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law . . . the application of contract law principles to plea agreements may require tempering in some instances." Id. at 387 (internal quotations and citation omitted).

For example, "'both constitutional and supervisory concerns require holding the government to a greater degree of responsibility than the defendant . . . for imprecisions or ambiguities in pleas agreements.'" Id. (quoting United States v. Ringling, 988 F.2d 504, 506 (4<sup>th</sup> Cir. 1993) (internal quotations omitted)). This approach is consistent with the rule of lenity in criminal cases that requires courts to favor defendants when construing ambiguities in punishment. Id. at 385. Based on this precedent, if there was any ambiguity in the amount of restitution owed, the concerns for Mr. Bickley's constitutionally protected rights require this Court to fault the State. Further, the State's "supervisory" role in procuring justice requires it to ensure that defendants understand the terms of a plea agreement. Id.; see also State v. Saunders, 1999 UT 59, ¶31, 992 P.2d 951 (prosecutors have duty to see that justice is done).

Under contract law, a party can rescind an agreement based on mutual mistake. Patience, 944 P.2d at 387-88. Under such a circumstance, there would be no meeting of the minds and, hence, no agreement. State v. Bero, 645 P.2d 44, 46 (Utah 1982). But, if one party bore the risk of mistake, that party has no right to rescission. Patience, 944 P.2d at 387-88. In Patience, for example, this Court ruled that the State bore the risk of mistake about a change in the law because the State is "deemed to know the law it is enforcing." Id. at 388.

The State has similarly failed to apply the law here. As explained above, trial courts can only impose restitution for uncharged conduct if they have "firmly established" that the defendants has admitted to committing other crimes or has agreed to pay restitution. Mast, 2001 UT App 402, ¶18, 40 P.3d 1143; Watson, 1999 UT App 273, ¶5, 987 P.2d 1289. Presumably, the State knew this rule of law but failed to follow it. Patience, 944 P.2d at 388. Rather than seeking out Mr. Bickley's understanding of the restitution agreement, the State appeared to proceed with the hope that it could obtain the highest restitution award possible without regard to Mr. Bickley's consent or requesting the trial judge to ascertain Mr. Bickley's agreement.

This case involves the State's "uninduced mistake" of which the State bore the risk. Id. Specifically, the plea agreement referred to "total" restitution rather than the statutorily defined concept of "complete restitution." R. 347. Likewise, had the State actually intended to require Mr. Bickley to pay restitution for all arrears dating back to

1982, it should have specified in the plea agreement. In contrast, Mr. Bickley clearly defined his position from the start of the prosecution that he only agreed to pay restitution for the period listed in the Information and, in fact, he hoped to pay less than the full amount for that period because of his health problems. Under these circumstances, the State bears the risk of any ambiguity in the plea agreement. Patience, 944 P.2d at 388.

The State further urges this Court to rescind the plea agreement because Mr. Bickley wishes to withdraw from a portion of or to modify the restitution agreement. State's Brief at 19. The State can unilaterally rescind a plea agreement by showing that facts analogous to a mistrial exists, or if the defendant breaches the agreement, seeks to withdraw from a portion of it, or wishes to unilaterally modify the agreement. Id. at 387. Here, Mr. Bickley does not seek any modification in the plea agreement. Rather, he seeks to enforce it. The State's argument is unpersuasive.

Finally, even if a plea agreement is invalid, this Court must enforce it if the defendant detrimentally relied on the agreement or had a "reasonably formed expectation[]" of its validity. Bero, 645 P.2d at 47; State v. Nine Thousand One Hundred Ninety-Nine Dollars, United States Currency, 791 P.2d 213, 216 (Utah Ct. App. 1990). Mr. Bickley had a reasonable expectation that the restitution amount was limited to the period specified in the Information. Throughout the proceedings, Mr. Bickley sought through several motions and arguments to limit the restitution award to that period and he claimed the court-ordered restitution amount may even be less due to his inability to

work. Judge Brian's faulty construction of civil collection of child support arrears was simply irrelevant to determining the parties' expectations.

Under any view of the evidence, Mr. Bickley was entitled to the benefit of the bargain to limit restitution to the dates listed in the Information and to the crime for which he was convicted. Watson, 1999 UT App 273, ¶5, 987 P.2d 1289. This Court should remand this matter to the trial court for a new restitution hearing rather than rescinding the agreement.

### **CONCLUSION**

Mr. Bickley requests this Court to remand this matter for a new restitution hearing with instructions to limit restitution to the period specified in the Information.

Submitted, this 11<sup>th</sup> day of July, 2002.




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**CERTIFICATE OF DELIVERY**

I, KENT R. HART, certify that I have caused to be delivered eight copies of this brief to the Utah Court of Appeals, 450 South State, 5<sup>th</sup> Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6<sup>th</sup> Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 17<sup>th</sup> day of July, 2002.

  
KENT R. HART

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this \_\_\_\_ day of July 2002.

\_\_\_\_\_